No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY DICKINSON (his wife), WILLIAM KEMP, and L. K. FEREVA, individually and doing business under the firm name and style of "Fereva Chevrolet Company",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE FILED BY LEAVE OF COURT.

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Upon oral argument emphasis was placed by appellant upon the case of

Pacific Indemnity Co. v. McDonald, 107 Fed. (2d) 446, 448,

in which the opinion was written by the Honorable Judge Wilbur, and it is cited to the point that in an action under the Federal Declaratory Judgment Act trial by jury is a matter of right. Appellee has no quarrel with the decision, but respectfully points out

that the holding of the court appears to be precisely what we are contending for, namely, as the opinion states:

> "If the issues are raised in an action at law the right to a jury trial obtains and if raised in an action in equity it may be determined by the court without a jury, or the court may call to its aid a jury whose verdict is advisory."

Where the issues are legal a jury may be demanded as a matter of right. But where the issues are equitable as well as legal the situation presented is an entirely different one. In such a case it appears to be well settled both in the Federal and California decisions, that the equitable issues are triable by the court without a jury, or by the court with a jury acting in an advisory capacity, and if there remain legal issues still to be determined they are triable by a jury.

This idea we submit is found in the Declaratory Judgment Act itself.

Judicial Code, Sec. 274-d, 28 U.S.C.A. Sec. 400.

There it is provided in subdivision (3):

> "When a declaration of right * * * shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

Likewise the federal rules of civil procedure maintain the distinction between legal and equitable issues. See

Rule 38, subdivision b and c, and *Rule 39.*

To what extent the rules supersede the Practice Conformity Act may yet be considered an open question. Possibly the statement in

35 *Cor. Jur. Sec.,* p. 968, Sec. 99,

is too sweeping. That authority states:

> "The Practice Conformity Act, under which practice in civil actions at law in the federal courts was governed by the practice in the state courts, has been superseded by the Rules of Civil Procedure for District Courts, except as to matters expressly excepted.
>
> Subject to the exceptions set forth in the Federal Rules of Civil Procedure, rule 81, 28 U.S.C.A. following section 723 c, as in the case of condemnation proceedings, see infra section 113, the Federal Rules of Civil Procedure, see section 96 supra, have superseded the Practice Conformity Act, 28 U.S.C.A. section 724, Rev. St. section 914, in so far as they are within the authority granted by congress. Thus no state law affecting practice or procedure can be given effect in the federal courts, unless the law relates to a matter expressly excepted from the rules."

A broader statement and possibly a more accurate one is found in

Cyclopedia of Federal Procedure, 2nd Edition, as follows:

> "Thus, a trial at common law consisted of a trial of the whole case as an indivisible entity; whereas, under the Rules of Civl Procedure, an action may now be split up into issues which may be tried separately, some with and some without a jury. It has been settled from the beginning that the Seventh Amendment applies to the fed-

eral courts only, but the constitutional and statutory right of trial by jury extends to the territories by virtue of statutes applicable to them, and also, with limitations, to some of the insular possessions of the United States. Since the right of trial by jury is constitutional there can be no conformity to state laws or practice in so far as that question is concerned. The question whether there is a right of jury trial when demanded is a federal question, and the doctrine of Erie R. Co. v. Tompkins does not apply so as to require the federal court to follow a state rule in determining whether a particular case is one to be tried by jury. But in the absence of any controlling statutory or constitutional provision or federal appellate decision, the federal court may follow the state law as to whether a particular issue in a case is triable by a jury or by the court. The right of trial by jury in the federal courts is such that an action cannot be maintained therein on a right of action which is legal in nature in the federal jurisprudence, given by state statute under which the action is not triable by jury.

The distinction between law and equity, abolished by the Rules of Civil Procedure, is a distinction in procedure and not a distinction between remedies; and the distinction between suits at law and suits in equity still remains for the purpose of determining whether a party is entitled to a trial by jury under the Seventh Amendment to the Constitution. Under Rule 38, the issues and not the form of the case determine the right to a jury trial, and if the basic issue is one which historically was for the jury, a jury demand should be respected. The right of trial by jury is preserved in suits at common law only.

There is no such right of trial in suits and proceedings in equity, and the fact that the subject matter of the suit involves that which is ordinarily triable by jury, does not affect the rule. Nor does the existence of incidental issues of fact of a legal nature in equity suits bring them within the constitutional guaranty. Conversely, where an action is essentially one at law, mere inclusion of an incidental prayer for equitable relief will not warrant the denial of a jury trial. However, a prayer for relief of an equitable nature may preclude a party from obtaining a trial by jury as of right. An equitable defense interposed in an action of a legal nature may raise equitable issues which are not to be tried by a jury as a matter of right, and the right to jury trial will be preserved only with respect to the legal issues, if any remain. The absolute right of trial by jury preserved by the Constitution is, of course, a matter entirely distinct from the discretionary power of a court to submit issues of an equitable nature to a jury. If the issues tendered by the pleadings are purely legal, the parties are entitled to a jury trial as of right when demanded in compliance with the provisions of Rule 38. If the issues are purely equitable or otherwise not triable of right by jury, the court has the undisputable right under Rule 39 to call a jury in an advisory capacity, either upon motion or of its own initiative, and to submit to the jury such issues as it sees fit, and in its discretion to accept or disregard the verdict; or, except in actions against the United States when a statute provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury

had been a matter of right. Both under the former and the present rules to send an equitable issue to a jury is within the discretion of the court to do or refuse, and it will refuse where it would be unjust and dilatory or where to do so would be useless because the question has already been determined by a master, and a contrary verdict could not be accepted. When a verdict has been reached on the issue tried, the court determines the equitable issues in the light of the verdict, but it is only advisory, and may be set aside or overruled."

Cyclopedia of Federal Procedure, 2nd Edition, Vol. 7, Sec. 3293, pp. 477 to 481.

We refer also to

Hughes Federal Practice, Vol. 18, sections 23091, 23252-3 and 23255.

However, the rule for which we contend prevails in California as well as in the federal courts. The state decisions like the federal hold that an action for declaratory relief under the state statute is *sui generis.* As Chief Justice Gibson puts it in the case of

Gore v. Bingaman, 20 Cal. (2d) 118, 120, 124 Pac. (2d) 17:

"The question thus presented is whether this action is legal or equitable in character within the meaning of the constitutional provision. Where a statutory remedy is involved which was created long after the historic distinctions between actions at law and cases in equity were formulated, there is extreme difficulty in applying the sections of the Constitution basing the division of appellate jurisdiction between the Supreme Court and District Courts of Appeal upon that

distinction. We have recently referred to the unfortunate aspects of this constitutional requirement. (De Garmo v. Goldman, 19 Cal. (2d) 755, 767-769, 123 P. (2d) 1.) Similar considerations make it difficult to determine whether an action for declaratory relief is to be classified as legal or equitable for the purposes of appellate jurisdiction. The code provisions do not characterize the remedy as legal or equitable in this state (Code Civ. Proc., secs. 1060 et seq.), and while authorities agree that its historical sources are almost exclusively equitable, the remedy has been stated to be sui generis rather than strictly legal or equitable. (Borchard, Declaratory Judgments 2nd ed. 1941, pp. 238, 248, 399, 439.) Thus, it has been suggested that where it becomes important under constitutional provisions to classify a particular action for declaratory relief as legal or equitable, the determination should depend upon the issues involved in the particular action. (See 13 So. Cal. L. Rev. 170, et seq.; 28 Cal. L. Rev. 638.)"

We touched upon the federal rule in the brief for appellee, pages 6 to 10 inclusive. This rule is stated in

35 *Cor. Jur. Sec.*, p. 1131, Sec. 135 (2)

as follows:

"If there be both legal and equitable issues in the case, as where both legal and equitable issues are joined in a single action, as discussed supra section 129, the former are triable before a jury and the latter by the court. However, if an incidental legal issue is made part of an essentially equitable cause, there is no right to a jury trial of the legal issues if the court can dispose of all questions under its general equity powers."

And that the California rule is in substance the same appears from the following decisions:

Among the early California cases on the subject is

Bodley v. Ferguson, 30 Cal. 511, at 519-520,

wherein the answer contained both a legal and equitable defense, and it was held that the court might first try the equitable defense and refuse the plaintiff a jury trial, and if the facts warranted it the equitable relief prayed for. The result was a final disposition of the case. The court says:

> "The answer, so far as it relies upon the deed of Mrs. Gilroy to the defendants' grantors, states a purely legal defense, and if it stated no more, there could be no question of the plaintiff's right to a jury trial. But the answer, over and beyond the legal title set up in the defendants, sets forth a parol contract to convey, with a view to the due execution of which the unacknowledged deed of Mrs. Gilroy was given. The terms of that contract are fully charged in the answer—and the entry and possession of the vendees under it—and the costly improvements made by them upon the land—and the subsequent purchase of the plaintiff, for a nominal sum, and with full notice of the defendants' transactions on the land and of the contract under which they and their grantees entered, and the answer winds up with a prayer 'that Bodley may be decreed to have no title in said premises or to any part thereof, but that as against him the same may be decreed to be the property of the defendants; that he may be decreed to hold the title and interest if any, which passed to him by said conveyance from said Montgomery, in trust for them; and that he may be decreed to convey, by a good and sufficient

deed, all said title, interest or claim to said defendants on demand, and that their title to said premises may be quieted, and that they have such other and equitable relief as may be agreeable to equity.' *That these allegations disclose an equitable defense, resting upon equitable ownership, is undeniable.* They were made upon the theory that the legal title was or might turn out to be in the plaintiff instead of the defendants, and they were intended to burden that title with a trust *in invitum* in the hands of the plaintiff. The relief asked for is equitable altogether. These facts not only demonstrate the quality of the answer, but show also that an appeal to the equity jurisdiction was a prevision, and not an afterthought, of the defendants or of the counsel by whom they were represented. *That the Court dealt with the case at the trial in the equity aspect of the answer is apparent from the circumstance that all the equitable issues were fully responded to,* and though the decree does not give all the equitable relief prayed for, nor all that the defendants were entitled to, still all of the relief given was equitable, and the plaintiff cannot complain on the score of the deficit. It is true that the Court has found that the legal title was in the defendants, as charged in the answer. But the finding does no harm, and for the reason that the charge did none. *The special defense was drawn with a law aspect and with an equity aspect. Perhaps the plaintiff might have compelled the defendants to elect on which of the two aspects they would go to trial, but he did not.* In the end the defendants voluntarily elected to take equitable relief, based upon the equitable facts found under the equity aspect

of the defense. Had the defendants elected in the end to take a common law judgment, based upon the finding that the deed referred to was an operative conveyance, the election would have related back to the trial, and the judgment would have been reversed on the ground that a trial by jury was claimed and improperly denied. The petition is denied."

In

Swasey v. Adair, 88 Cal. 179, at 180-81, 25 Pac. 1119,

it was held that the answer of the defendant did not sufficiently tender an equitable defense, but the rule upon which we rely is stated as follows:

"It has been stated by this court in many cases that when the defendant interposes equitable and legal defenses to the complaint, the proper rule of procedure for the court is to hear and dispose of the equitable defense before proceeding to try the issues of law. (Arguello v. Edinger, 10 Cal. 160; Estrada v. Murphy, 19 Cal. 273; Weber v. Marshall, 19 Cal. 457; Lestrade v. Barth, 19 Cal. 671; Martin v. Zellerbach, 38 Cal. 319; 99 Am. Dec. 365; Fish v. Benson, 71 Cal. 434.) By making an equitable defense in such action the defendant does not, however, lose any right which he would otherwise have to have the issues of law tried by a jury, nor does the court, by virtue of being called upon, under the above rule, to first hear and dispose of the equitable defense, acquire the right to pass upon all the issues in the case without a jury. It may happen in many cases that the result of the trial of the equitable defense will obviate the necessity of a trial of the legal

issues. The trial may dispose of all of the issues in the case, or the equitable relief granted may be such as to prevent the trial of the issues at law, as was the case in Bodley v. Ferguson, 30 Cal. 511."

In

Estudillo v. Security Loan etc. Co., 158 Cal. 66, at 71, 109 Pac. 884,

a case which also involved its final disposition without a jury, the court says of the procedure:

"The only error of law assigned in the notice was the refusal of the court to grant plaintiff's demand for a trial by jury. The complaint sought to set aside a foreclosure sale for fraud. The answer denied the allegations of fraud. At the trial the court announced that both legal and equitable issues were involved, and denied the demand for a jury trial so far as the equitable issues were concerned, declaring, at the same time, that the denial was without prejudice to the right of plaintiffs to have a trial by jury of the legal issues, *if there appeared to be any occasion for a trial of such issues after decision of the equitable issues.* It then proceeded to try, without a jury, the issues of fraud raised by the pleadings, and found in favor of defendants on these issues. We see no error in this. It is not disputed that an attack upon judicial proceedings for fraud presents a case appealing to the equity side of the court. Such case is not one which the parties are, of right, entitled to have tried by a jury. Where an action involves both legal and equitable issues, 'the former are ordinarily triable by the court and the latter by a jury.' (24 Cyc. 113.)

The court below proceeded in accordance with this rule."

The rule is frequently considered by the District Courts of Appeal, as for example,

First National Bank v. Superior Court, 71 Cal. App. 64, 69-70, 234 Pac. 420,

where the court says:

"It is possible that when, in an action at law, equitable matters are set up in an answer purely as a defense, that is, with no demand for affirmative relief, the controversy is not thereby changed from an action at law to a suit in equity (35 C. J. 174; and as bearing somewhat upon the *principle* announced, see Lewis v. Tobias, 10 Cal. 574; Smith v. Sparrow, 13 Cal. 596; Shain v. Belvin, 79 Cal. 262, 21 Pac. 747). Where, however, the equitable matters alleged by the defendant are not merely defensive, but are matters of affirmative attack, the situation is quite different. It is said in a standard law publication that 'if the answer contains not merely a technical defense but an independent equitable cause of action constituting a cross-demand in favor of defendant, the effect of which, if established, would extinguish plaintiff's cause of action, the issue taken thereon is triable by the court and not of right by a jury' (35 C. J. 175). This rule, apparently prevailing everywhere, has found adequate expression in the opinions of our own courts. It was said in a cause in which a cross-complaint praying equitable relief had been interposed in opposition to a complaint at law: 'Being an action cognizable in equity and distinct from the legal action, it was the duty of the

court below to first determine the issues involved under the cross-complaint, for the reason that if the defendant succeeded on these issues it would defeat the right of plaintiffs to recover in their action at law, however perfect their legal right' (Fish v. Benson, 71 Cal. 428, 12 Pac. 454; and see, also, Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119). We have no doubt that under the conditions thus far considered petitioners are not entitled to a jury trial of the action, except, perhaps, under the case last cited, in the event that the equitable relief prayed by Stansbury should be denied, the right to a jury trial thereafter may exist upon the few issues arising from the meager denials in the amended answer of allegations of the complaint."

In

Crouser v. Boice, 51 Cal. App. (2d) 198, 204, 124 Pac. (2d) 329,

wherein legal and equitable issues were involved, and the right to a jury trial specifically considered, the court in holding that the order granting a new trial was not appealable as no right to a jury trial existed, says:

"We think this principle is determinative of the present case. Plaintiffs pleaded a purely equitable cause of action. So far as the pleadings, findings, conclusions and judgment are concerned plaintiffs believed they were entitled to such relief when they filed the action. Defendants pleaded that plaintiffs knew defendants did not have title. The court found that defendants in fact had title and had never informed plain-

tiffs to the contrary. At the very time judgment was entered the trial court must have believed that specific performance was possible, because it granted that relief. It is obvious, therefore, that the award of damages in the event defendants were unable or refused to perform was intended as a substitute for the relief of specific performance. This being so, such award, under fundamental principles, was made in the exercise of the equity jurisdiction of the court, and defendants were not entitled as of right to a jury trial on that issue. It inevitably follows that under section 963, subsection 2, Code of Civil Procedure, the order granting the new trial is not appealable."

Also in

Asamen v. Thompson, 55 Cal. App. (2d) 661, 672, 13 Pac. (2d) 841.

"It has been stated by the Supreme Court in many cases that when a defendant interposes equitable and legal defenses to the complaint, the proper rule of procedure for the court is to hear and dispose of the equitable defense before proceeding to try the issues of law. (Arguello v. Edinger, 10 Cal. 150, 160; Estrada v. Murphy, 19 Cal. 248, 273; Weber v. Marshall, 19 Cal. 447, 457; Lestrade v. Barth, 19 Cal. 660, 671; Martin v. Zellerbach, 38 Cal. 300, 319, 99 Am. Dec. 365; Fish v. Benson, 71 Cal. 428, 12 P. 454.) It may happen in many cases that the result of the trial of an equitable defense will obviate the necessity of a trial of the legal issues, and the trial may even dispose of all of the issues in the case, or the equitable relief granted may

be such as to prevent the trial of the issues at law, but whenever the trial of the equitable defense does not have such result, and the issues at law remain undisposed of, these issues are to be tried in the same manner as though no equitable defense had been interposed."

For a recent expression of this rule by the California Supreme Court we refer to

Connell v. Bowes, 19 Cal. (2d) 870, 872, 123 Pac. (2d) 456,

where will be found a very interesting discussion by Chief Justice Gibson who points out that

"The practical problem presented by this rule is solved by the trial procedure outlined by Justice Henshaw in Angus v. Craven, 132 Cal. 691, 699, 64 Pac. 1091, approved by the Thomson case, whereby the equitable issues are tried first and then, if any legal issues remain, a jury may be called."

And we also refer to the decision written by Justice Curtis in

Pacific Western Oil Co. v. Bern Oil Co., 13 Cal. (2d) 60, 87 Pac. (2d) 1045,

where the discussion begins at page 66.

Probably an adequate definition of waiver for the purposes of this argument is that "waiver is the intentional relinquishment of a known right".

First National Bank v. Maxwell, 123 Cal. 360, 55 Pac. 980;

Aaronson v. Frankfort Accident, etc. Co., 9 Cal. App. 473, 99 Pac. 537;

Coolidge v. Standard Accident, 114 Cal. App. 716, 300 Pac. 885.

A waiver as distinguished from an estoppel depends upon the existence of an intent to waive.

Orr v. Mutual Life Ins. Co., 64 Fed. (2d) 561;
Public Warehouses v. Fidelity & Deposit Co., 77 Fed. (2d) 831.

Estoppel is a different matter and especially equitable estoppel. This was referred to by Judge Welsh in his instructions to the jury, transcript page 406:

> "The principle of estoppel may be defined as follows: Where a person tacitly encourages an act to be done he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induce the party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

The language of this instruction is taken from

Swain v. Seamens, 9 Wall. 274, 19 Law. Ed. 554,

and

Dickerson v. Colgrove, 100 U. S. 580, 25 Law. Ed. 618.

The instruction is responsive to the pleading of the defendants.

The difference between legal and equitable estoppel is pointed out in

31 *Cor. Jur. Sec.* p. 248, sec. 62,

as follows:

"There is quite a distinction between the two classes of estoppel, legal and equitable. Legal estoppel, which is founded on deeds and judicial records, excludes evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppel, which is in pais, see supra section 59 c, is admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth."

Equitable estoppel has been considered by our California courts in various connections.

The definition is given in

10 *Cal. Jur.* p. 611, sec. 2,

as follows:

"An estoppel has been defined to be a bar 'by which a man is precluded from alleging or denying a fact, in consequence of his own previous action, inaction, allegation, or denial which has led another to so conduct himself that, if the truth were established, that other would be damaged',—an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterward drawn in question between the same parties or their privies. As stated by the supreme court of California, whether the estoppel rests in judgment, deed, contract, or in pais, in its essence it amounts to but this, that one may

be forbidden to show the existence of a fact because by his past conduct, his declarations, his agreement, his deed, or a judgment, it would work an injustice and an injury to his adversary to permit him to do so."

We also find a definition in

California Code of Civil Procedure, Sec. 1962, subd. 3,

as follows:

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Estoppel *in pais* is of equitable cognizance.

10 *Cal. Jur.* p. 626, sec. 14;

Smith v. Anglo California Trust Co., 205 Cal. 496, 504, 271 Pac. 898.

Whether the issues are legal or equitable is of course to be determined from the pleadings.

People of Porto Rico v. Livingston, 47 Fed. (2d) 712.

We respectfully submit that in the case at bar the complaint of plaintiff may be held to present legal issues. It is also framed as one to avoid multiplicity of actions. How many actions must be attempted to be controlled in one suit to bring the matter within the cognizance of equity as a suit to avoid multiplicity is difficult to state. Here there were four possible actions. There were ten in

Jamerson v. Alliance Ins. Co. of Philadelphia,
87 Fed. (2d) 253.

Possibly the number may present a question addressed to the discretion of the trial court.

On filing their answer and amendment to answer defendants presented equitable issues and asked for affirmative relief. These issues were to be tried by the court and not by a jury. That they were addressed to the court and not to the jury was the attitude of defendants up to the time they submitted the proposed findings to the trial judge. We call this Honorable Court's attention to these proposed findings beginning at page 45 of the transcript, and ask that there be specially noted the proposed finding XXVI, at page 67, and the proposed judgment paragraph VI, pages 78-9.

As we have pointed out with reference to these equitable issues the defendant Fereva trailed along with the other defendants. The trial judge found against the defendants upon the issue of equitable estoppel. None of the defendants contended at any time that Fereva had given any notice whatever within 60 days except the alleged remark of Fereva to Urquhardt, a deaf man, found in the transcript pages 328-9, as follows:

> "Bob, I want to report a little crackup I had down the highway the other morning with my tow car." I said, "I was called out in the morning to go out to pull a car out of the ditch, and while I was towing the car out of the ditch another car ran into the car we were towing out. There were several people injured; they were scratched and bruised, but nothing serious."

Urquhardt denies that any statement whatever was made to him by Fereva prior to 60 days after the happening of the accident.

The theory of the equitable defense was that by the course of conduct pursued by the plaintiff for some years Fereva was misled and caused to omit giving the notice required by condition 7 of the policy of insurance, and that hence the notice embodied in the alleged remark to the deaf man should be deemed a sufficient compliance with the term of the policy. The trial court found that this was not true; found that the alleged remark was not a compliance with condition 7; and further found that it was never made, that is, that Fereva gave no notice whatever prior to April 26, 1940 (see Findings, Transcript page 96), and that there was no estoppel.

We submit that in making its findings on the equitable issues the trial court completely disposed of all of the questions involved in the case; that there was no legal issue remaining to be determined by a jury; that in the entire record there is not the least bit of evidence showing or tending to show that the notice required by condition 7 of the policy was given to plaintiff prior to April 26, 1940. And to have referred any such question to the jury as a legal issue would have been ridiculous.

It is to be regretted that there was not a more careful compliance with the federal rules of civil procedure. To quote from

(*American*) *Lumbermen's Mutual Casualty Co. v. Timms & Howard,* 108 Fed. (2d) 497,

"the case discloses procedural oddities". However, the judgment of the court is sound, fair and just and we respectfully submit that it should be affirmed.

Dated, San Francisco,
May 24, 1944.

Respectfully submitted,
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